Toffoloni v. LFP Publishing Group, LLC Doc. 29

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, vs. **LFP PUBLISHING GROUP, LLC,** d/b/a Hustler Magazine, et al, Defendant.	)))))))))))))	CASE NO. 1:08-cv-00421-TWT

NOTICE OF DEFENDANT'S INTENT TO PETITION SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI AND MOTION TO STAY PROCEEDINGS

Defendant LFP Publishing Group, LLC, d/b/a Hustler Magazine, et al. ("LFP") hereby notifies the Court of its intent to petition the Supreme Court of the United States for writ of certiorari and respectfully moves this Court to stay proceedings pending the resolution of said petition and, if granted, the merits of the appeal. In support of this motion, LFP shows this honorable Court as follows:

1. On June 25, 2009, a panel of the United States Court of Appeals, 11th Circuit (the "Panel") reversed and remanded this Court's October 6, 2008 Order granting LFP's Motion to Dismiss, D.I. 13.

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2. LFP timely filed a Petition for Rehearing *En Banc*, which petition was denied by the Court of Appeals on August 27, 2009.

3. The Court of Appeals issued its Mandate on September 4, 2009, D.I. 27, and this Court adopted the Mandate by its Order signed on September 14, 2009, D.I. 28.

4. LFP hereby provides notice of its intent to file with the United States Supreme Court on or before November 25, 2009, a petition for writ of certiorari to review and reverse the serious Constitutional error of the Eleventh Circuit's June 25, 2009 decision.

5. LFP's certiorari petition will present a compelling case for review by the United States Supreme Court; and specifically, seek certiorari raising, *inter alia*, the following substantial questions of Constitutional importance:

> A. Whether the decision of the Panel amounts to content-based discrimination against speech prohibited by the freedom of the press guaranteed by the First Amendment to the U.S. Constitution?
>
> B. Whether the Panel's decision causes substantial uncertainty regarding the media's right to comment and publish on matters of public interest, and will result in an unconstitutional chilling effect on the freedom of the press under the First Amendment?
>
> C. Whether the Panel's decision is based on an unconstitutional and erroneous interpretation and

application of the Georgia common law right of publicity as that tort is defined by the Georgia Supreme Court?

D. Whether the Panel's decision is contrary to the United States Supreme Court decisions in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2849 (1977) and *Time v. Hill*, 385 U.S. 374, 87 S. Ct. 534 (1967).

6. In light of the above and for the reasons set forth in the accompanying Memorandum of Law in Support of Motion to Stay Proceedings, there is a reasonable probability that LFP's petition for writ of certiorari will be granted, and there is a significant possibility that the Eleventh Circuit's June 25, 2009 decision will be reversed.

7. Given that a ruling on the petition could not possibly come before mid-January 2010,[1] and is unlikely to come before the spring of 2010, if this Motion to Stay Proceedings is denied and the petition for certiorari granted, LFP will suffer irreparable harm. Specifically, LFP will likely be required to incur the

[1] LFP's petition is due on November 25, 2009; *amicus curiae* briefs in support of the petition are anticipated and due no later than thirty days after the case is placed on the United States Supreme Court docket, which in no case could be before December 28, 2009; briefs in opposition of the petition if filed would likewise be due no earlier than December 28, 2009, but likely later; and reply briefs, if any, would at the earliest be due on January 7, 2010, but again, would much likely be due later.

substantial burden and expense of litigating the merits of this case through fact discovery; expert discovery; *Daubert*, summary judgment and other pre-trial motions; and potentially a trial on the merits before a final resolution of the appeal is accomplished.

8. Good cause, therefore, exists for this Court to grant LFP's Motion to Stay Proceedings.

WHEREFORE, for the foregoing reasons, LFP prays that this Court stay the proceedings herein until such time as the Supreme Court of the United States has ruled on LFP's petition for writ of certiorari, and if granted, until a final ruling on the merits of the appeal.

Respectfully submitted this 17th day of September 2009.

/s/ S. Derek Bauer
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CERTIFICATION OF COUNSEL

Pursuant to N.D. Ga. Local Rule 7.1D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1B.

/s/ S. Derek Bauer
S. Derek Bauer

CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing **Notice of Defendant's Intent to Petition Supreme Court of the United States for Writ of Certiorari and Motion to Stay Proceedings** via the CM/ECF system which will automatically send notification to Plaintiff's attorney of record, who is a participant in the CM/ECF system.

Respectfully submitted this 17th day of September 2009.

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